Office - Supreme Court, U.S.
FILED
SEP 20 1982
ALEXANDER L. STEVAS,
CLERK

82-515

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

WILLIAM J. MURPHY, JR.,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent,

On Certiorari from the Court of Appeals, For the Third Circuit

PETITION FOR CERTIORARI CRIMINAL CASE

EPHRAIM MARGOLIN
COUNSEL OF RECORD
NICHOLAS C. ARGUIMBAU
240 Stockton Street, 3d Floor
San Francisco, CA 94108
Telephone: (415) 421-4347
Attorneys for Petitioner

BOWNE OF SAN FRANCISCO, INC. • 180 NINTH ST. • S.F., CA 94103 • (415) 864-2300

SUPREME COURT OF THE UNITED STATES

October Term, 1981

WILLIAM J. MURPHY, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent,

PETITION FOR CERTIORARI
Criminal Case

QUESTIONS PRESENTED FOR REVIEW

I. Whether the lower courts misinterpreted requirements for co-conspirator instructions.

II. Whether it was error for the trial court to deny petitioner's new trial motion, when the crucial witness was a participant in the Federal Witness Protection program.

III. Whethere there was a variance between the allegations of the indictment and the evidence introduced in trial regarding the victim of the alleged extortion.

IV. Whether the trial court erred in excluding the testimony of Senator Jacob Zimmerman as impeachment testimony on a collateral issue.

V. Whether the evidence supported a conviction.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
STATEMENT OF JURISDICTIONAL GROUNDS AND REFERENCE TO DECISIONS SOUGHT TO BE REVIEWED	1
STATUTES WHICH THE CASE INVOLVES	2
STATEMENT OF THE CASE	4
ARGUMENT	
I. THIS CASE PRESENTS AN IMPORTANT UNSETTLED ISSUE OF INTERPRETATION OF REQUIREMENTS FOR CO-CONSPIRATOR INSTRUCTIONS, AS TO WHICH THE COURTS BELOW ERRED.	18
II. IT WAS ERROR FOR THE TRIAL COURT TO DENY PETITIONER'S NEW TRIAL MOTION WHEN THE CRUCIAL WITNESS WAS A PARTICIPANT IN THE FEDERAL WITNESS PROTECTION PROGRAM.	26
III. THERE WAS A VARIANCE BETWEEN THE ALLEGATIONS OF THE INDICTMENT AND THE EVIDENCE INTRODUCED AT TRIAL REGARDING THE VICTIM OF THE ALLEGED EXTORTION, WHICH AMOUNTED TO A CONSTRUCTIVE AMENDMENT OF THE INDICTMENT.	31
IV. THE TRIAL COURT ERRED IN EXCLUDING THE TESTIMONY OF SENATOR JACOB ZIMMERMAN AS IMPEACHMENT TESTIMONY ON A COLLATERAL ISSUE.	35

	Page
V. THE EVIDENCE IS INSUFFICIENT TO SUPPORT CONVICTION.	36
CONCLUSIONS	36

TABLE OF AUTHORITIES

Page

Cases

Berry v. Monongahela Connecting Railraod Co., 497 F.2d 181 (3d Cir. 1978) 36

Brady v. Maryland, 373 U.S. 83 (1963) 26,27, 28, 29

Commonwealth v. Saulsbury, Pa. Supr. 25 A. 610 (1893) 32

Gould v. State, Oh.App. 152 N.E. 788 (1925) 33

Hicks v. State, Ga.App. 114 S.E. 911 (1922) 32

McMillen v. U.S., 386 F.2d 29 (1st Cir. 1967) 22, 25

On Lee v. U.S., 343 U.S. 747 (1952) 18, 23

Singleton v. Lefkowitz, 583 F.2d 618 (2d Cir. 1973) 30

Tillery v. U.S., 411 F.2d 644 (5th Cir. 1969) 22

U.S. v. Agurs, 427 U.S. 97 (1976) 28, 29

U.S. v. Beasley, 519 F.2d 233 (5th Cir. 1975) 22

U.S. v. Budzanoski, 462 F.2d 443 (Cir. 1972), cert. denied, 409 U.S. 949 36

U.S. v. Crocker, 568 F.2d 1049 (3d Cir. 1977) 33

Page

U.S. v. Finazzo, 288 F.2d 175 (6th Cir. 1961), cert. denied, 368 U.S. 837 — 31

U.S. v. Gonzales, 617 F.2d 1358 (9th Cir. 1980) — 30

U.S. v. Hill, 627 F.2d 1052 (10th Cir. 1980) — 20

U.S. v. Hyde, 448 F.2d 814 (5th Cir. 1971), cert. denied, 404 U.S. 1058 (1972) — 32

U.S. v. Leonard, 494 F.2d 955 (D.C. Cir. 1974) — 21, 24

U.S. v. Long, 574 F.2d 761 (3d Cir. 1978), cert. denied, 439 U.S. 985 — 35

U.S. v. Martin, 489 F.2d 674 (9th Cir. 1973) — 20

U.S. v. Mendez-Rodriquez, 450 F.2d 1 (9th Cir. 1971) — 30-31

U.S. v. Miah, 433 F.Supp. 259 (ED.Pa. 1977), affirmed, 671 F.2d 573 — 35

U.S. v. Nelson, 486 F.Supp. 464 (W.D. Mich 1980) — 35

U.S. v. Provenzano, 334 F.2d 678 (3d Cir. 1964), cert. denied, 378 U.S. 947 — 32

U.S. v. Stirone, 361 U.S. 212, 4 L.Ed.2d 252, 80 S.Ct. 270 (1960) — 33

Page

U.S. v. Wasko, 473 F.2d 1282 (7th Cir. 1973) 20, 24

U.S. v. Windom, 519 F.2d 989 (5th Cir. 1975) 22

U.S. v. Wright, 573 F.2d 681 (1st Cir. 1978), cert. denied, 98 S.Ct. 2857 21

Codes, Statutes

Hobbs Act (18 U.S.C. § 1951) 2, 4, 18, 32

STATEMENT OF JURISDICTIONAL GROUNDS AND REFERENCE TO DECISIONS SOUGHT TO BE REVIEWED

Petitioner seeks review of the judgment of the Court of Appeals for the Third Circuit denying petitioner's appeal from conviction in a criminal case. Petitioner further seeks review of the order of the Court of Appeals denying his petition for rehearing and suggestion for rehearing en banc. Said judgment and order were filed respectively on June 22 , 1982, and July 21, 1982.

Petitioner additionally seeks review of his conviction in the District Court for the District of Delaware.

This Court has jurisdiction under 28 U.S.C § 1254.

STATUTES WHICH THE CASE INVOLVES

THE HOBBS ACT (18 U.S.C. § 1951). Interference with commerce by threats or violence.

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section -

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property

of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

STATEMENT OF THE CASE

This is an appeal from a judgment of conviction based on a one-count Indictment charging the defendant with violating 18 U.S.C. § 1951 (The Hobbs Act). The original indictment in this case was returned on May 1, 1981. A superseding indictment was returned on June 11, 1981. The charging paragraph of the superseding indictment alleged that from on or about November, 1977, and continuing up to and including August 31, 1978, the defendant WILLIAM M. MURPHY, JR., ". . . did knowingly, willfully, and unlawfully obstruct, delay, and affect commerce . . . and the movement of articles and commodities in commerce, by extortion . . . in that the defendant, WILLIAM M. MURPHY, JR., obtained property from Blue Hen Associates, Inc., t/a National Homes of Dover through the payment of United States currency by its President and owner, Herbert H. Gregory

. . . in return for drafting, supporting, endorsing, and otherwise promoting legislation to effect a change in the maximum finance charge that could be assessed under Delaware State law on the financing of mobil homes . . . in violation of Title 18, United States Code, Section 1951."

Trial of this case commenced on July 27, 1981, before District Judge Walter K. Stapleton. On August 3, 1981, the jury returned a verdict of guilty.

On August 10, 1981, the defendant filed a motion to set aside the jury's verdict and, in the alternative, a motion for new trial. On September 24, 1981, the defendant filed a further motion for new trial on ground of newly discovered evidence.

On October 2, 1981, Judge Stapleton issued an opinion denying the defendant's motions. On October 19, 1981, Judge Stapleton denied defendant's motion for new trial on ground of newly discovered evidence.

On October 29, 1981, judgment of conviction was entered in the District Court, and the defendant was sentenced to three years imprisonment and ordered tc pay a fine of $5,000. On the same date the defendant's motion to stay execution of sentence pending appeal was granted, and defendant filed his notice of appeal to the Third Circuit Court of Appeals.

The Third Circuit Court of Appeals affirmed without opinion on June 22, 1982. Petitioner timely filed a petition for rehearing and suggestion for rehearing en banc, which were denied on July 21, 1982. The Court of Appeals has stayed the remittitur pending decision of this Court.

At trial the main evidence against petitioner consisted of the testimony of a mobile home dealer, whose credibility was very successfully undermined at trial, and the tape of a conversation between Gregory and the defendant.

Gregory testified as follows. A resident of Dover, Delaware (RT B-3),[1/] he was the owner of Blue Hen Associates, an exceptionally large (RT A-12) retail mobile home dealer with customers in Pennsylvania, New Jersey, Virginia, Maryland, and Delaware (RT B-6). The business thrived in the early 70's but began to slow in the mid- to late-70's (RT B-11). Under Delaware law, a mobile home is classified as a motor vehicle for which there was a seven percent ceiling on the interest rate for consumer loans (RT B-12). As a result, in 1977 and 1978, fewer and fewer banks were willing to finance loans for mobile homes in Delaware, and business declined dramatically because of the lack of financing (RT B-14).

[1/] Throughout this brief, transcript references are denoted with "RT," and references to the Appendix in the Court of Appeals are designated with "A."

Gregory testified that he had on-going discussions with his primary lending institution, Maryland National Bank, about the problem and particularly with a bank officer, Craig Nisbet. He also allegedly discussed the matter with defendant, State Senator WILLIAM M. MURPHY, JR., who initially advised him to seek an opinion of the State Attorney General as to whether the mobile homes could be classified as other than motor vehicles (RT B-15). An opinion was eventually forthcoming, which was unfavorable (RT B-16).

Some time in mid-1977 at a meeting with officials of Maryland National, it was allegedly agreed that Gregory would approach Senator MURPHY to sponsor legislation relaxing the interest-rate limits on mobile home financing (RT B-18). MURPHY was an old friend, whom he would back "on anything that he wanted" (RT B-19). Gregory testified that when he proposed the legislation to MURPHY, the Senator "was not really enthused about it," but Gregory "applied some

pressure" and asked "[W]hat will it take to get it done?"

MURPHY, according to Gregory, "kind of thought to his self a little while" and after repeated inquiries about what it would "take to get it done," said "what about $5,000? I think I can handle it" (RT B-21). Gregory immediately called Nisbet at the bank and told him that he "could get the legislation handled, but that it would cost $5,000" (RT B-22). The bank, according to Gregory, agreed to put up the $5,000, but as $2,000 down and the remainder "when we saw some action on this bill" (RT B-23). Gregory told Nisbet he would "put the $2,000 in my company account and I would clean the money up through my accounts and get cash" to pay Senator MURPHY (Id.).

Gregory testified that he gave MURPHY the $2,000 and was reimbursed by the bank; through Nisbet (RT B-28), the bank eventually covered the payment through a debit

to Blue Hen's "special reserve account" (RT A-138), an account the first $50,000 (in practice, all) of which was inaccessible to Blue Hen and designed as security for the bank's credit (RT B-9, 10, 11). In theory, Blue Hen could get back a maximum of ten percent of the $50,000, but only on expiration of all outstanding loans (RT B-89); Gregory never felt that would be returned to him (RT B-179, 180).

Nesbit concurred in Gregory's testimony that he had $2,000 of bank funds from the special reserve account, "not generally available to" Gregory (RT A-46. See also A-53) released "to pay Senator Murphy for introducing the bill . . ." (RT A-29). It was, said Nisbet, a "political contribution, payoff, whatever . . ." (RT A-54). However, Nisbet had no knowledge of the money actually getting to Murphy.

Gregory also testified, contrary to his initial statements to the FBI, that he had paid MURPHY an additional $3,000, but

produced no documentation of this fact at trial and could not identify the specific dates, times, or places of the transactions involved (RT B-32-3, 102-3).

At trial, Gregory admitted having given a multitude of false statements to the FBI (RT B-90 et seq.) and to having directed the falsification of a sworn campaign fund statement (RT B-159).

Gregory's credibility was, as noted by the Judge, "so thoroughly besmirched at trial that . . . the jury could not have attached much weight to Gregory's character when it chose to believe him and not Senator Murphy" (A-91).

Gregory's reputation for truthfulness and honesty was the subject of considerable testimony at trial. Gregory acknowledged his state indictment on ten counts of felony theft and one count of a campaign law violation (A-177), which led to his cooperation with the FBI; his practice of selling mobile

homes out of trust (RT B-137); his failure to pay income taxes, withholding taxes, and Social Security (RT B-138-139); his conversion of customers' motor vehicle document fees to his own business (RT B-143-144); payoffs to various bank officials for credit considerations (RT B-145); and his direction to his campaign treasurer to submit under oath a false campaign report (RT B-159).

The witnesses who were familiar with Gregory's reputation in the community for truthfulness and honesty, or who expressed an opinion on Gregory's character for truthfulness, were universal in their condemnations. George Wallace Bromley, a former Gregory employee, testified that Gregory's reputation for telling the truth was "minimal" (RT D-27). Larry McKinley, who had had business dealings with Gregory, stated that he would believe little of what Gregory said (RT D-62). Robert Snyder, a former employee and campaign treasurer for Gregory, testified

that Gregory would "tell you what you wanted to hear as long as it benefitted him" (RT D-81). He had agreed to serve with Gregory's political campaign before he knew Gregory well enough to form that opinion (RT D-83). Finally, Robert Craig, another former Gregory employee, stated that his opinion of Gregory's truthfulness was "not too good" and Gregory's reputation in the community was worse (RT D-86).

Besides Gregory's testimony, the prosecution relied chiefly upon the taped conversation between Gregory and MURPHY made after the former had agreed to cooperate with the FBI and had been granted immunity.

During the taped conversation, Gregory expressed concern about an unidentified $2,000 and the knowledge of his bookkeeper, Pat Reynolds, of an unspecified $2,000 transaction on an unspecified date between unspecified parties. MURPHY, in response to Gregory's statement that "we were in the office when she brought that in"

was "yeah, but she didn't bring cash." When asked "Don't tell me there's a [foul word] check written to you?" MURPHY simply replied "Huh2" and then a denial (A-16). No direct mention of a cash payment to MURPHY was made in the conversation. Pat Reynolds testified at trial that no such transaction occurred and that she had not even been employed by Gregory at the time of the alleged transaction (RT C-258 et seq.)

There are two analogous tapes: one with prosecution withness Nisbet and one with MURPHY. Both individuals had the same to say about Gregory's behavior during the taped conversations: that Gregory acted highly excited and disturbed and that, as friends, they assented to much of what he was saying simply to mollify him (see, e.g., RT A-41, 47-8, and RT C-92). Prosecution witness Nisbet,

in particular, said that "I wouldn't say these recordings hold a lot of water" and that he tended to fabricate and exaggerate "because of the way Herb was conducting his end of the conversation" (RT A-47-8).

With regard to the meeting at which the alleged meeting took place, MURPHY had an alibi confirmed by his bank (RT C-53-4) and testimony of an associate (RT D-48-9) that he had met with Gregory in the morning and was occupied all afternoon. The check which was cashed for the supposed purpose of paying MURPHY at the meeting was, in fact, cashed in the afternoon, according to bank records (RT D-95-6).

Thus, given Gregory's history, there is a high probability that he persuaded the bank to give him $2,000 to make a payment which never occurred.

MURPHY admitted participating in the drafting of legislation, introduced by a colleague and narrowly defeated, but denied

receiving any payments for that effort.

Following the trial of this case, newspaper articles began to appear on September 18, 1981, regarding the activities of Herbert Gregory during the time when he was under the United States Marshal's Service Witness Protection Program. Gregory was entered into the program in January, 1981, pending the trial of this case. The newspaper articles and investigation of the matters in these articles conducted by counsel for the defendant, disclosed that Herbert Greg[illegible] had been relocated by the Marshal's Service to Worthing, South Dakota, under the name of Herbert McCabe. Upon his arrival in Worthing, Gregory purchased a bar named the Silver Slipper Bar, investing between $10,000 and $18,000 as a deposit on the purchase of the bar and related expenses.

This transaction took place approximately five months after Gregory filed a bankruptcy petition in the United States

Bankruptcy Court for the District of Delaware, at a time when Gregory was receiving payments from the government of $8 per day per family member as a subsistence allowance under the Witness Protection Program. The order authorizing Gregory's admission to the Program became effective in December, 1980.

In response to the defendant's motion for a new trial on ground of newly discovered evidence, Assistant United States Attorney William C. Carpenter, Jr., filed an affidavit stating that the United States had no knowledge of the source of Gregory's down payment on the South Dakota bar. The affidavit did not deny that the government was aware of the fact that Gregory had purchased a bar while in the Witness Protection Program and that a substantial down payment had been made. (See, generally, the new trial motion and supporting materials, A-36 et seq.)

ARGUMENT

I. THIS CASE PRESENTS AN IMPORTANT UNSETTLED ISSUE OF INTERPRETATION OF REQUIREMENTS FOR CO-CONSPIRATOR INSTRUCTIONS, AS TO WHICH THE COURTS BELOW ERRED.

Petitioner has consistently maintained that this case required that the jury be given a cautionary instruction as to the testimony of a co-conspirator or accomplice. The trial court refused to do so, on two grounds. First, the Court concluded in terms of the Hobbs Act, Gregory was a victim, not an accomplice, nor was he subject to prosecution for a Hobbs Act violation. Second, the Court concluded that its cautionary instruction as to the testimony of an immunized witness fulfills the requirement of the co-conspirator instruction (A-76-78). For reasons which follow, this conclusion constituted reversible error.

This Court stated in On Lee v. U.S., 343 U.S. 747, 757 (1952):

"The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may raise serious questions of credibility. To the extent that they do, a defendant is entitled to broad latitude to probe credibility by cross-examination and to have the issues submitted to the jury with careful instructions."

Subsequent implementation of this holding in the lower courts, however, has created a plethora of legal standards, demanding guidance from this Court.

When, as here, cautionary instructions on the weight to be given accomplice testimony are requested, the courts have developed the following rules.

The instructions "must be given when requested by defense counsel, at least when the testimony of an accomplice is substantially uncorroborated." U.S. v. Martin, 489 F.2d 674, n. 2 at 677 (9th Cir. 1973).

The instructions must be given "if the testimony of an accomplice is uncorroborated." U.S. v. Hill, 627 F.2d 1052, 1053 (10th Cir. 1980).

The instructions must be given if "much of [the accomplice's] testimony was uncorroborated." U.S. v. Wasko, 473 F.2d 1282, 1285 (7th Cir. 1973).

While it is "better practice" to give cautionary instructions, where the testimony is uncorroborated, it is not reversible error to fail to do so, U.S. v. Finazzo, 288 F.2d 175, 176 (6th Cir. 1961, cert. denied, 168 U.S. 837).

It is "reversible error to refuse to give a requested accomplice instruction" or to refuse to give an analogous cautionary instruction for a witness granted immunity, apparently without regard to corroboration, in the District of Columbia Circuit, U.S. v. Leonard, 494 F.2d 955, 960-61 (D.C. Cir. 1974).

In addition to the above varying rules, a variety of rules have been established for reversal as "plain error" in the absence of a request for instructions. Examples of these rules are the following.

There is plain error if the testimony is "incredible or otherwise insubstantial on its face," U.S. v. Wright, 573 F.2d 681, 685 (1st Cir. 1978, cert. denied, 98 S.C. 2857).

There is plain error if "the testimony of the accomplice is the only direct evidence against the accused," U.S. v. Windom, 519 F.2d 989, 994 (5th Cir. 1975).

There is plain error if the testimony is uncorroborated and the judge gives a general "presumption of truthfulness" instruction, McMillen v. U.S., 386 F.2d 29, 36 (1st Cir. 1967).

There is plain error if the testimony is uncorroborated and there is a "substantial issue on the reliability or credibility" of the accomplice, U.S. v. Beasley, 519 F.2d 233, 241 (5th Cir. 1975).

There is plain error when "crucial testimony was extremely unreliable, if not incredible," Tillery v. U.S., 411 F.2d 644, 648 (5th Cir. 1969).

Thus, the trial court's decision in this case, assuming Gregory to have been an accomplice, was unquestionably error on the basis of the standards for requested

instructions in the Ninth Circuit, Seventh Circuit, and D. C. Circuit, but, arguably, not under the applicable standards of the Sixth and Tenth Circuits. On the other hand, this case additionally meets the "plain error" standards of the First Circuit and Fifth Circuit. It is unarguably correct that the law needs this Court's guidance when in one circuit the instruction is not required when requested, under facts which would make the instruction mandatory without a request in another circuit.

Petitioner submits that the concerns expressed by this Court in On Lee, supra, dictate that the course which would be followed in the majority of circuits be followed in the present case: that because Gregory's testimony was fraught with credibility problems and substantially uncorroborated, a cautionary instruction was mandatory, regardless of a request therefor. An excellent discussion of the

policy considerations is contained in Leonard, supra, which petitioner recommends to the Court for its adoption.

The District Court's two-fold basis for a denial is without merit. First is the Court's assertion that Gregory was a "victim" rather than an "accomplice." This assertion, however, is inconsistent with his own testimony that the $2,000 came from a fund within the bank which was inaccessible to him. Thus, taking the evidence in the light most favorable to the prosecution, he was both victim and accomplice and could have been charged as an accomplice with regard to the bank. In any event, his motives for cooperating with the police were clear. If he "participated in the criminal activity and . . . had the same motive of currying favor with the police as would an actual accomplice," a precautionary instruction is required just as much as if he were an actual accomplice, U.S. v. Wasko, supra,

473 F.2d 1282, 1285 (7th Cir. 1973). Consequently, even if Gregory could not have been charged as an accomplice in a Hobbs Act violation with respect to which Blue Hen was the "victim," he could still have been prosecuted with the bank as "victim."

Moreover, at least one case has held that no such distinction exists and that the "victim" may be prosecuted along with the principal under the Hobbs Act. See, U.S. v. Nelson, 486 F.Supp. 464 (W.D. Mich. 1980).

Finally, the trial court's alternative grounds for decision - the use of other instructions as eliminating the need for accomplice instructions - is contrary to the case law. See, for instance, McMillen v. U.S., supra, 386 F.2d 29, 34 (1st Cir. 1967).

For these reasons, this Court should grant certiorari and reverse the decisions below.

II. IT WAS ERROR FOR THE TRIAL COURT TO DENY PETITIONER'S NEW TRIAL MOTION WHEN THE CRUCIAL WITNESS WAS A PARTICIPANT IN THE FEDERAL WITNESS PROTECTION PROGRAM.

This case presents an important unresolved issue: the extent of the prosecution's obligations to disclose relevant information concerning a key witness who has been made unavailable to the defense through the Federal Witness Protection Program. As will be seen, this issue illustrates the need to resolve an apparent conflict between standards of materiality under Brady v. Maryland, infra, and in cases of unavailable witnesses.

The record establishes, as discussed above, that the prosecution witness, Gregory, acquired substantial funds in the period following his supposed payoffs of $5,000 to Senator MURPHY, even while claiming to be bankrupt. These funds were used for a down payment on a bar in South Dakota, acquired under the name assumed by him under the Federal Witness Protection Program, from which he was receiving only nominal assistance of $8 per day. The evidence, thus, bears upon his credibility and raises the inference that the funds supposedly destined for Senator MURPHY

were, in fact, diverted to a fund undisclosed to Gregory's creditors. The trial court denied petitioner the opportunity to develop this line of evidence, discovered only by accident when the press disclosed Gregory's double identity.

When, as a result of action or inaction of the prosecution, witnesses or evidence available to the prosecution are not made available to the defense or are affirmatively made unavailable, the federal courts have developed a variety of standards for assuring that the prosecution's conduct will not unduly interfere with the defendant's right to a fair trial.

The leading case is, of course, Brady v. Maryland, 373 U.S. 83 (1963), which held that failure of the prosecution to disclose evidence favorable to the accused violates due process when the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. An important case in the

Brady line is U.S. v. Agurs, 427 U.S. 97 (1976), which set forth a two-tiered standard of responsibility for prosecutors. Agurs applied a variable standard of materiality depending on whether the defendant makes a specific request for the evidence in question or not. If a specific request is made to the government before trial and denied, Brady is violated if the suppressed evidence "might have affected the outcome of the trial." 427 U.S. at 104. If a specific Brady request is not made to the government, suppressed evidence will warrant a reversal if the evidence in question, evaluated in the context of the entire record, raises reasonable doubt as to the guilt of the accused. It is the latter, more stringent standard that was applied by the trial court in rejecting the defendant's motion for a new trial (A-90).

When, as here, the witness is totally unavailable as a result of the actions

of the prosecution and law enforcement, the Agurs requirement for a specific request is illusory. How, one might ask, could the petitioner have possibly asked for specific information concerning Gregory's purchase of a bar in South Dakota when Gregory's very identity or whereabouts had been concealed by the authorities? Such difficulties must, it is submitted, place the prosecution under a greater burden of disclosure so as to assure that evidence of possible assistance to the defense will not be made unavailable through the device of the Witness Protection Program.

A line of cases parallel to the Brady line has considered a question akin to that here: the standard of "materiality" of testimony from witnesses made unavailable through the action of the government. These cases have held that the prosecution and law enforcement may not, through their action, intentionally allow material witnesses to become unavailable to be interviewed by the

defense and that when this, nontheless, occurs, the defendant is not obliged to demonstrate "materiality," even under the Brady standards.

In Singleton v. Lefkowitz, 583 F.2d 618, 623 (2d Cir. 1973), the release from custody of co-conspirators and consequent unavailability to the defense was held grounds for reversal of a conviction with "no showing that the witness's testimony would be favorable to the defense." U.S. v. Gonzales, 617 F.2d held that when the government has knowingly permitted witnesses to a crime to leave the country, the defendant need only demonstrate that he or she "'could conceivably' benefit from [the] missing witness's testimony" to obtain a dismissal with prejudice of the complaint.

As suggested by the cases, these relaxed standards of materiality are necessitated by the fact that the prosecution's acts have themselves prevented the defense from meeting that threshhold requirement. See, e.g., U.S. v. Mendez-Rodriguez,

450 F.2d 1 (9th Cir. 1971), the seminal case in this line of authority.

The analogy is clear. For the trial court to demand a high degree of specificity and a stringent showing of materiality, when the government itself has made the witness unavailable to attorney interviews and defense investigators, would be unreasonable and, it is submitted, a denial of due process. Since the District Court applied an incorrect standard to the new trial motion in this case, reversal is required.

III. THERE WAS A VARIANCE BETWEEN THE ALLEGATIONS OF THE INDICTMENT AND THE EVIDENCE INTRODUCED AT TRIAL REGARDING THE VICTIM OF THE ALLEGED EXTORTION, WHICH AMOUNTED TO A CONSTRUCTIVE AMENDMENT OF THE INDICTMENT.

The superseding indictment in this case, in identifying the victim of the alleged extortion states that the defendant ". . . obtained property from Blue Hen Associates, Inc., t/a National Homes of Dover through the payment of United States currency by its

President and Owner, Herbert H. Gregory." The allegations of the indictment relating to interstate commerce refer to interstate transactions carried on by Blue Hen Associates, Inc.

The Hobbs Act, 18 U.S.C. § 1951, incorporates the common law crime of extortion. The gravamen of the offense of extortion is loss to the victim. U.S. v. Provenzano, 334 F.2d 678 (3d Cir. 1964), cert. denied, 378 U.S. 947; United States v. Hyde, 448 F.2d 814, 843 (5th Cir. 1971), cert. denied, 404 U.S. 1058 (1972). At common law, a variance between the identity of the victim of an extortion in the indictment and the evidence offered at trial was held to be fatal in Hicks v. State, Ga.App., 114 S.E. 911 (1922), and Commonwealth v. Saulsbury, Pa.Supr., 25 A. 610 (1893). The identity of the person tendering payment does not establish the true identity of the victim, since a payment by someone else on behalf of the victim of an extortion is

equivalent to a payment by the victim. Gould v. State, Oh.App., 152 N.E. 788 (1925).

In general, where there exists only a variance between the facts alleged in the indictment and the evidence offered at trial, not relating to an essential element of the offense, the inquiry upon appeal is whether the defendant was offered fair notice of the charge against him and whether the defendant is protected from a subsequent prosecution for the same offense. However, where the variance between indictment and evidence amounts to an amendment of an essential element of the crime charged, the variance is per se reversible error, requiring no analysis of prejudice to the defendant. United States v. Stirone, 361 U.S. 212, 4 L.Ed.2d 252, 80 S.Ct. 270 (1960); United States v. Crocker, 568 F.2d 1049 (3d Cir. 1977).

The trial court erred in applying these rules of law by holding that the variance had not impaired the defendant's ability

to prepare his defense or his right not to be prosecuted twice for the same crime (A-69). Since the identity of and loss to the victim is an essential element of the crime of extortion, and the loss to a particular victim engaged in interstate commerce is essential to a Hobbs Act prosecution, a variance relating to the alleged victim goes to an essential element and is per se so prejudicial, requiring a reversal.

With respect to the $2,000 payment on which most of the testimony focused, Gregory's testimony was clear that, since he and Blue Hen had no right to dip into the "special reserve account," the "victim" was not Blue Hen at all, but the bank. As for the additional $3,000, there is no evidence in the record to point to any specific "victim." Thus, the evidence is insufficient to support any "victim" other than the bank, which was not named in the indictment. For the above reason, reserval is required in this case.

IV. THE TRIAL COURT ERRED IN EXCLUDING THE TESTIMONY OF SENATOR JACOB ZIMMERMAN AS IMPEACHMENT TESTIMONY ON A COLLATERAL ISSUE.

Gregory testified on cross-examination that he had made a cash payment of $500 to Senator Jacob Zimmerman for support of the same legislation as is involved in this case. During the defendant's case, the trial court ruled that Zimmerman would not be allowed to testify that no such payment had been made to him.

Evidence of a series of payments, even if not all to the defendant, is admissible to show intent or a common plan or scheme. Federal Rules of Evidence, Rule 404 (b); U.S. v. Long, 574 F.2d 761 (3d Cir. 1978), cert. denied, 439 U.S. 985; U.S. v. Miah, 433 F.Supp. 259 (E.D.Pa. 1977), affirmed, 671 F.2d 573. Where the prosecution sets out to prove a common plan or scheme by a series of acts, such as payments, each act becomes material. If an act becomes a material issue,

then contradictory or rebuttal testimony may be introduced as to the matter. United States v. Budzanoski, 462 F.2d 443 (3 d Cir. 1972), cert. denied, 409 U.S. 949; Berry v. Monongahela Connecting Railroad Co., 497 F.2d 181 (3d Cir. 1978).

Therefore, it was proper for the defendant to disprove the "common plan or scheme" through the testimony of Senator Zimmerman. Not to permit it was error.

V. THE EVIDENCE IS INSUFFICIENT TO SUPPORT CONVICTION.

On this issue, arguments I and V in petitioner's opening brief on appeal in the Court below are incorporated herein by reference to the extent permitted by the rules of this Court.

CONCLUSIONS.

For the above reasons, the petition should be granted and the judgments of

the courts below reversed.

Dated: September 17, 1982.

Respectfully submitted,

EPHRAIM MARGOLIN
NICHOLAS C. ARGUIMBAU

By _____
Ephraim Margolin

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO. 81-3088

UNITED STATES OF AMERICA

v.

WILLIAM M. MURPHY, JR.,

Appellant

On Appeal from the United States District Court
for the District of Delaware
Crim. No. 81-00016

Argued June 10, 1982

Before: ADAMS and WEIS, Circuit Judges, and
CONABOY, District Judge.*

JUDGMENT ORDER

After considering all contentions raised by appellant, namely, that (1) the government failed in its obligation to prove a payment to Murphy by Gregory on November 9, 1977, because of the trial court's conclusion that Gregory's testimony would not support a jury verdict, and the reliance by the government on a taped conversation relating to an incident which could not have happened on that date; (2) the trial court erred in denying defendant's motion for a new trial on the ground of newly discovered evidence; (3) there was a variance between the allegations of the indictment and the evidence introduced at trial regarding the victim of the alleged extortion which amounted to a constructive amendment of the indictment; (4) the court below erred in refusing to give co-conspirator or accomplice instruction to the jury; (5) the government failed to prove any depletion of assets of Blue Hen Associates and this issue was

---

* Hon. Richard P. Conaboy, United States District Court for the Middle District of Pennsylvania, sitting by designation

improperly submitted to the jury; and (6) the trial court erred in excluding the testimony of Senator Jacob Zimmerman as impreachment testimony on a collateral issue, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

R.E.B. Circuit Judge

ATTEST:

Sally Nrvos, Clerk

DATED: JUN 22 1982

APPENDIX B

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 81-3088

UNITED STATES OF AMERICA

v.

WILLIAM M. MURPHY, JR.,

Appellant

SUR PETITION FOR REHEARING
EN BANC

Present: SEITZ, Chief Judge, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, Circuit Judges, and CONABOY, District Judge.*

The petition for rehearing filed by Appellant

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Dated: JUL 21 1982

Circuit Judge

* Hon. Richard P. Conaboy, United States District Court for the Middle District of Pennsylvania, sitting by designation.